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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2009-0108
	DEPARTMENT A
GINA NOEL AVILA,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
ALBERT AVILA,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20074225

Honorable K.C. Stanford, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Appellant Albert Avila appeals from the trial court's order dissolving his marriage to appellee Gina Avila. He argues the trial court abused its discretion in dividing the couple's assets because it failed to consider "the tax consequences of liquidating the assets" and miscalculated the division of a certain account. Finding no error, we affirm.

Background

¶2 "[W]e consider the evidence in the light most favorable to upholding the superior court's ruling and will sustain the ruling if it is reasonably supported by the evidence." *Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13, 167 P.3d 705, 708 (App. 2007); *see also Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998). Albert and Gina Avila were married in 1993 and have three minor children. In November 2007, Gina petitioned for dissolution of the marriage. After a trial, the court dissolved the marriage, awarded sole custody of the minor children to Gina, scheduled "reasonable parenting time" for Albert, and divided the couple's assets and liabilities.

¶3 A month later, Albert filed a motion to correct a mistake or to alter or amend the judgment, arguing the trial court had, inter alia, "created an inequitable division by giving the petitioner post-tax assets and the respondent pre-tax assets." The trial court ordered briefing on the question of "post-tax and pre-tax impacts." It then concluded that although it could consider "tax consequences" in dividing community property under A.R.S. § 25-318(B), such consideration was discretionary. And, because "[n]either party presented evidence at trial on the tax consequences, if any, related" to the couple's property, it "decline[d] to consider the tax consequences to each party" from

liquidating the divided property. The court subsequently entered a decree of dissolution and this appeal followed.

Discussion

¶4 Albert first contends the trial court did not equitably divide the community's assets because it awarded him two 401(k) accounts,[1] which would be taxed if liquidated, and awarded Gina a home, which, according to Albert, would not be subject to taxation, even if sold. "In apportioning community property between the parties at dissolution, the superior court has broad discretion to achieve an equitable division, and we will not disturb its allocation absent an abuse of discretion." *Boncoskey*, 216 Ariz. 448, ¶ 13, 167 P.3d at 708. We address questions of statutory interpretation de novo. *Farmers Ins. Co. of Ariz. v. Young*, 195 Ariz. 22, ¶ 5, 985 P.2d 507, 509 (App. 1998).

¶5 Albert raised this issue after trial in his motion to alter or amend the judgment. "An issue raised for the first time after trial is deemed to have been waived." *Medlin v. Medlin*, 194 Ariz. 306, ¶ 6, 981 P.2d 1087, 1089 (App. 1999). Even if not waived, however, his argument lacks merit. Section 25-318(B) states: "In dividing property, the court may consider all debts and obligations that are related to the property, including accrued or accruing taxes that would become due on the receipt, sale or other disposition of the property." Thus, based on the plain language of the statute, a trial court *may* consider "accruing taxes that would become due on the . . . disposition of the property." *Id.* Albert argues, however, that the trial court is required to consider

[1]A 401(k) account is a retirement savings account established pursuant to 26 U.S.C.A. § 401(k).

potential tax ramifications, at least when "taxes that will become due upon the disposition of the property will affect its value to such an extent that it would render the division of the property inequitable." We disagree.

¶6 "In interpreting statutes, our central goal 'is to ascertain and give effect to the legislature's intent.'" *Yarbrough v. Montoya-Paez*, 214 Ariz. 1, ¶ 12, 147 P.3d 755, 759 (App. 2006), *quoting Washburn v. Pima County*, 206 Ariz. 571, ¶ 9, 81 P.3d 1030, 1034 (App. 2003). "To determine legislative intent, we look first to the language the legislature has used as providing 'the most reliable evidence of its intent.'" *Id.*, *quoting Walker v. City of Scottsdale*, 163 Ariz. 206, 209, 786 P.2d 1057, 1060 (App. 1989). "If a statute's meaning is clear and unambiguous, we give effect to its plain language without resorting to other rules of construction." *Ariz. Dep't of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, ¶ 15, 126 P.3d 1063, 1067 (App. 2006).

¶7 Here the statute's language is clear and unambiguous and provides that a trial court *may* consider taxes that will become due upon disposition of an item of property. By using permissive rather than mandatory language, the legislature gave trial courts discretion to decide whether to consider such tax consequences. Thus, the trial court here correctly acknowledged that it had the discretion to consider tax consequences in distributing property. Had the legislature intended to require trial courts to consider tax consequences to the parties in the distribution of property, it could have so provided in the statute. *See Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976). In this case, we cannot say the trial court abused its discretion in the division of

marital property, particularly in the absence of any evidence at trial about potential tax consequences.

II. Money market account

¶8 Albert also alleges the trial court erred by failing to account for certain money he alleges was taken by Gina. According to Albert, the couple previously had a jointly held money market account from which Gina had transferred $3,502.00 to an account in her sole control in December 2007. At trial, Albert introduced a computer-generated document attributed to the Tucson Federal Credit Union's (TFCU) "on-line" banking records showing that this amount had been withdrawn from that account on December 12, 2007. He testified he had not withdrawn the funds. "The trial court has broad discretion to allocate assets and obligations and its decision will not be disturbed absent a clear abuse of discretion." *Nelson v. Nelson*, 164 Ariz. 135, 138, 791 P.2d 661, 664 (App. 1990).

¶9 We note that the court's first amended accounting chart for the division of assets includes an entry of $12,295.00. This amount equals the total of two withdrawals by Gina from the couple's two joint accounts with TFCU. A credit union document, dated December 12, 2007, shows a balance of $8,793.00 in the regular savings account and a balance of $3,502.00 in the money market checking account. The TFCU documents Albert introduced show the sum of $8,793.00 was withdrawn from the couple's regular savings account on December 12, 2007, and the sum of $3,502.00 was withdrawn from the couple's money market checking account on the same day. Gina testified, and a bank statement introduced at trial showed, that she had deposited

$12,000.00 from these withdrawals into an account solely in her name at Pima Federal Credit Union on December 14, 2007. The court's division of assets charged Gina with all of the money she withdrew from their two TFCU accounts and included Albert's share in the equalization payment the trial court ordered. Therefore, the trial court did not fail to account for the $3,502.00 withdrawn by Gina and did not abuse its discretion.

Disposition

¶10 The judgment of the trial court is affirmed. Gina has requested an award of attorney fees on appeal pursuant to A.R.S. § 25-324. In the exercise of our discretion, and in view of the reasonableness of the parties' positions, we award Gina fees and costs pending her compliance with Rule 21, Ariz. R. Civ. App. P.

VIRGINIA C. KELLY, Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PHILIP G. ESPINOSA, Judge